(2)

No. 90-1036

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROGER ATKINSON; POLLY ATKINSON;
and ROGER ATKINSON AND POLLY ATKINSON,
as guardians ad litem for CHAD ATKINSON,
Petitioners,

v.

IHC HOSPITALS, INC. aka INTERMOUNTAIN HEALTH CARE HOSPITALS, INC., a Utah corporation, SCOTT WETZEL SERVICES, INC., a corporation, SCOTT OLSEN; STEPHEN G. MORGAN; MORGAN, SCALLEY & READING; and JOHN DOES I THROUGH X,
Respondents.

On Petition for a Writ of Certiorari to the Utah Supreme Court

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RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

COUNTER STATEMENT OF FACTS

Respondents will not burden the Court with their own detailed statement of the facts. Respondents merely wish to clarify certain facts that have either been omitted or are not apparent from the Petitioners' Statement.

1. Petitioners have incorrectly argued that IHC and Wetzel misrepresented the medical condition of the child to the parents, and that with treatment, the child would be normal. (Petitioners' Brief at p. 3). All parties understood at the time of the 1983 settlement the child's

condition was not normal and this is what prompted a settlement with a prospective payment in the amount of $1,280,000, plus medical benefits. (Petitioners' Brief at A-14; 798 P.2d at 738). For instance, at the probate hearing, when Judge Fishler inquired as to the nature of the child's injuries, Mrs. Atkinson replied "brain damage". Additionally, the Atkinsons were informed that the full extent of the child's condition had not been ascertained. In the release that the Atkinsons signed, it unequivocally states: "[t]he undersigned hereby declare and represent that the injuries sustained by Chad Atkinson are or may be permanent and progressive and that recovery therefrom is uncertain and indefinite." (Petitioners' Brief at A-14; 798 F.2d at 737). It is also undisputed that Wetzel offered to send the child to Arizona for independent tests to evaluate the extent of the brain damage, or to wait until the full extent of damage had been ascertained before solidifying the settlement terms. (Petitioners' Brief at A-14; 798 P.2d at 737, 738). The Atkinsons refused both of these proposals and opted instead to settle the case. (Petitioners' Brief at A-14; 798 P.2d at 738). Finally, at the probate hearing the court specifically asked the Atkinsons whether they understood that by settling this matter they would not later be able to sue IHC, even if they found out the child's condition was worse than anticipated. The Atkinsons responded in the affirmative. (Petitioners' Brief at A-15; 798 P.2d at 738).

2. The Atkinsons' omitted from their Statement that they were legally considered to be adults at the time of the child's birth and during the settlement negotiations. (Petitioners' Brief at A-3; 798 P.2d at 734). Moreover, the Atkinsons failed to include the critical fact that they were assisted in settlement negotiations by Roger Atkinson's father, George, a union negotiator who prepared a ten page counter proposal on behalf of the Atkinsons. (Petitioners' Brief at A-3; 798 P.2d at 734).

3. The Atkinsons settled on a prospective total payout of $1,280,000, assuming a normal life span of 65 years for the child, plus complete medical expenses for the child until he reaches age 15. (Petitioners' Brief at A-4; 798 P.2d at 734).

4. The Atkinsons have also incorrectly argued that Steve Morgan was their attorney and that he did not properly represent their interests at the probate hearing. (Petitioners' Brief at p. 5). The record is clear that at no time did the Atkinsons consider Morgan to be their attorney. (Petitioners' Brief at A-5; 798 P.2d at 735). Morgan and the law firm represented only IHC, and such representation was clearly shown on the headings of all the pleadings submitted to the probate court and reviewed by the Atkinsons. (Petitioners' Brief at A-5; 798 P.2d at 735). Furthermore, there was no employment contract or retainer agreement between the Atkinsons and Morgan, and the Atkinsons did not hire or pay Morgan for his services. (Petitioners' Brief at A-5; 798 P.2d at 735). Rather, Morgan was retained by IHC to prepare relevant pleadings and documents for approval of the settlement agreement and to petition the probate court on behalf of IHC for approval of the settlement agreement. Additionally, neither Morgan nor any other attorney at the law firm was ever asked by IHC, the Atkinsons, or any other person to evaluate the terms, conditions, and amounts of the agreed upon settlement. Such an evaluation would have been impossible since no data relating to the facts and legal issues of the terms, conditions and amounts of the settlement was ever given to Morgan or the law firm. Moreover, the settlement was concluded and finalized between the parties prior to any involvement on the part of Morgan. Finally, at the probate hearing, the Atkinsons informed Judge Fishler that they had consulted with an attorney (not Morgan) who advised them that since a settlement had been reached, that they were not in need of representation. (Petitioners' Brief at A-6; 798 P.2d at 735). At no time did the

Atkinsons claim that Morgan made that statement to them. Similarly, the Atkinsons have misstated that after the probate hearing Morgan changed the settlement documents and obtained the Atkinsons' signature on the altered documents. (Petitioners' Brief at p. 5).

5. The Atkinsons incorrectly state that Judge Fishler did not properly investigate the underlying claims of the lawsuit before approving the settlement. (Petitioners' Brief at p. 5). An examination of the probate hearing transcript shows that prior to determining that the settlement was in the best interests of the child, Judge Fishler considered several factors. Specifically, Judge Fishler questioned the Atkinsons about the nature of the child's injuries, which Mrs. Atkinson acknowledged was "brain damage"; whether they had consulted a lawyer regarding the settlement; whether they believed the settlement was in the best interests of their child; whether they understood the structure and total payout under the settlement terms; and whether they understood they would not be able to sue IHC in the future, even if the child's conditioned worsened. Judge Fishler was also aware of the facts underlying the accident and that the full extent of brain damage had yet to be ascertained by the parties. After receiving satisfactory responses to his inquiries, Judge Fishler approved the settlement.

6. Finally, the Atkinsons assert that "Wetzel and IHC did not contest the factual elements of fraud. Nothing could be further from the truth. *Both* Wetzel and IHC specifically *denied* each of the factual elements of fraud where appropriate in their motions for summary judgment.

ARGUMENT

I. PETITIONERS DUE PROCESS CLAIM WAS NOT RAISED IN THE UTAH COURTS, THERE IS NO FEDERAL QUESTION HERE THAT CONFLICTS WITH ANY STATE, APPELLATE OR SUPREME COURT DECISION, AND PETITIONERS' DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE SETTLEMENT PROCEDURE.

A. Petitioners Did Not Properly Raise the Due Process Claim in the Utah Courts.

At no time before any Utah court did Petitioners raise the issue of whether their due process rights were violated. Petitioners' assertion that this unique claim was raised in their Petition for Rehearing before the Utah Supreme Court—albeit "somewhat indirectly" (*See* Petition for Certiorari, p. 10 n. 1) is simply inaccurate. In support of the contention that the due process claim was raised in the Utah courts, Petitioners assert that *Missouri Pacific Railway Co. v. Lasca*, 79 Kan. 34, 99 P. 616, 618-19 (1909) was cited for the proposition that "the settlement can only become effective when given judicial sanction . . . and this must be upon a real and not perfunctory hearing: * * * upon due judicial examination." Petition for Certiorari at 10 n.1. Petitioners did not cite the 1909 *Lasca* Case for its due process analysis as they assert in their Petition for Certiorari. Indeed, in the Petition for Rehearing before the Utah Supreme Court, Petitioners cited a *different page* of the *Lasca* Case and quoted that case as supportive of the standard applicable for reviewing a judgment. Petitioners argued:

> [T]he Kansas Supreme Court held that the court's duty "to protect the interests of infants was *not performed by inquiring of the parents if they were satisfied with the agreement* . . . ." The court also stated that if "there is no judicial investigation of the facts upon which the . . . recovery is based, the

> judgment . . . must be set aside in a proper proceeding when its effect, if allowed to stand, would be to bar the infant's rights."

Petition for Rehearing-Petitioners' Brief at A-29 (emphasis added by Petitioners).

Nowhere in the Petition for Rehearing before the Utah Supreme Court did the Petitioners purport to cite the *Lasca* Case for a purported federal due process analysis. Moreover, the companion case *Perry v. Umberger*, 65 P. 280 (Kan. 1937) was cited in the Petition for Rehearing as supporting the same position as *Lasca* was cited for and nowhere does *Perry* mention any federal due process issue.

Indeed, if Petitioners *had* intended to cite *Lasca* for its due process analysis, that cite was misplaced. *Lasca cannot* stand for that proposition because nowhere in that case is found *any* analysis of a federal due process issue. Rather, *Lasca* merely reviews the standard for vacating a judgment under Missouri law.[1]

B. In Deciding *Atkinson*, the Utah Courts Did Not Decide Any Federal Question in a Way That Conflicts with the Decision of Another State Court of Last Resort or of a Federal Court of Appeals. Nor Did the Utah Supreme Court Decide an Important Question of Federal Law Which Has Not Been, But Should Be Settled by This Court.

Among other reasons, the Petition for Certiorari should be denied ~~because:~~ (1) there is no "important" federal question involved in this case, and (2) there are no con-

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[1] Although it might be acknowledged that some of the language found in *Lasca* might sound similar to a due process type analysis, one will search that case in vain to find *any* reference to due process. Rather, the more logical explanation for that language is found under state law. Consistent with Petitioners' assertion in the Petition for Certiorari (p. 12): "it is an ancient precept of Anglo-American jurisprudence that infants and other incompetent parties are wards of any court called upon to weigh the child's interest.

flicting decisions from other state courts, U.S. courts of appeals, or from this Court.

1. *Petitioners have not raised an "important" federal question that should be reviewed by this Court.*

As discussed above, a federal question with regard to due process was not properly asserted in this case in the courts below. Moreover, Petitioners have *still* failed to raise *any* important federal question. Indeed, *not one* of the cases or citations offered by Petitioners' *suggests* that such a federal due process question is presented under the facts of this case.

This case raised issues before the state courts as to whether the settlement of a possible medical malpractice claim involving a minor was proper; whether, pursuant to Utah law, the probate court appropriately approved the settlement; whether a Release of All Claims signed by Petitioners was obtained by fraud or whether it was valid and binding; whether the Petitioners were represented by legal counsel; and whether a factual or legal basis existed for a legal malpractice claim.

All of these issues are matters of state law, *not* federal law. Not only must the issue involve a federal question, but the federal issue in question must be substantial.[2] Here, where the only questions of law involved state practice,[3] where the state court's decision can and should be interpreted as construing state law [4] and where the decision of the state court was not so *fundamentally* unfair

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[2] *See e.g. Millinger v. Hartupee*, 6 Wall. 258, 261 (1867) ("[s]omething more than a bare assertion . . . seems essential to the jurisdiction of this court."); *City of New Orleans v. New Orleans Waterworks Co.*, 142 U.S. 79, 87 (1891) ("the bare averment of a federal question is not in all cases sufficient.").

[3] *See e.g. New York ex rel. Consolidated Water Co. v. Matlbie*, 303 U.S. 158 (1938).

[4] *See e.g. Black v. Cutter Laboratories*, 351 U.S. 292 (1956).

as to require the application of some compelling federal interest,[5] this Court should refuse to review the state court judgment.

2. *In this case, no federal question has been decided in a way that conflicts with the decisions of other state courts, U.S. courts of appeals, or this Court.*

Although Petitioners have not directly asserted that an important federal question has been decided in a way that conflicts with decisions of other state courts, of U.S. courts of appeals or of this Court, an analysis of such an issue, if it *were* asserted, reveals that there *is* no such conflict. Indeed, as stated above, the only issues involved here are matters of state law. It is well established that, absent some compelling federal interest, each state is the ultimate arbiter of issues involving state law. Even if this court were to accept Petitioners' rather jaundiced view of the facts, there *still* remains no issue of federal law to be decided here. Kansas can decide when it is necessary to set aside a probate hearing. So may Tennessee. So may Utah.

Utah law permits a probate court to approve a settlement "if the court determines that the transaction is in the best interests of the protected person." Utah Code Ann. 75-5-409(2). The Utah Supreme Court considered all of Petitioners' allegations, and, for purposes of reviewing the summary judgment, accepted Petitioners' allegations as true and still concluded that "the settlement in all respects was fair"—a standard accepted by the court as a correct statement of the law. *See* Petitioners' Brief at A-10, 798 P.2d at 736. Indeed, the state laws applicable to such situations may vary somewhat from state to state. However, such minor variations from state to state merely reflect the public policy and legal doctrines of the respective states and further confirm the healthy diversity of our federal system. These

[5] *See e.g. Martin v. Walton*, 368 U.S. 25 (1961).

minor variations compelled by our diversity and the nature of our federal system do not create the kind of fundamental unfairness that requires review by this Court.

C. Petitioners' Due Process Rights Were Not Violated by the Settlement Procedure.

Pursuant to Utah law, when a court is called upon to approve a compromise of an infant's claim, the court may ratify the settlement "if the court determines that the transaction is in the best interests of the protected person." Utah Code Ann. 75-5-409(2). The Utah Supreme Court examined all of Petitioners' various claims and concluded that the settlement proceedings met this standard.

In their Petition for Writ of Certiorari, Petitioners argue that the Utah Supreme Court committed error by holding that the probate hearing, wherein Judge Philip Fishler approved the settlement agreement, was conducted in a jurisprudential manner. Specifically, the Atkinsons allege Judge Fishler did not make an independent determination as to the appropriateness of the setlement, but relied only on the Atkinsons' statements that they believed the settlement was fair.

It is apparent from the facts of this case that Chad Atkinson was afforded his due process rights. First, it is undisputed that a hearing was conducted on the settlement agreement, that the Atkinsons (as Chad's guardians ad litem) had notice of the hearing, and that the Atkinsons were present at the hearing. Second, an examination of the hearing transcript shows that Judge Fishler properly considered several factors before approving the settlement. For instance, in addition to inquiring about whether the Atkinsons believed the settlement was in the best interests of their child, Judge Fishler also questioned them regarding: (1) the nature of Chad's injuries; (2) whether they believed they had a valid claim against

IHC; (3) whether they had consulted a lawyer about the settlement; (4) whether they understood the payment structure of the settlement; (5) whether they had calculated the amount of total payout under the plan; and (6) whether they understood they would not be able to sue IHC in the future, even if Chad's injuries became worse than anticipated. Transcript of July 22, 1983 Court hearing.

Judge Fishler has also testified that prior to confirming the settlement he read IHC's petition for approval of the settlement. Deposition of Judge Philip Fishler at pp. 13, 14. Therefore, Judge Fishler would have been aware that Chad's brain damage was the result of a plug forming in his respirator tube, and that the full extent of brain damage had yet to be ascertained by the parties. The petition also would have advised Judge Fishler of the terms of the settlement agreement wherein IHC agreed to pay all of Chad's medical expenses, both past and future, in addition to paying the Atkinsons more than one million dollars over the course of Chad's life.[6]

Judge Fishler was sufficiently advised at the probate hearing of the circumstances and provisions underlying the claims so as to enable him to reasonably conclude that approval of the settlement was in Chad's best interests as required by Section 75-5-409(2) of the Utah Code. The Utah Supreme Court correctly ruled that the hearing complied with Utah law and was conducted in a jurisprudential manner.

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[6] Over $900,000.00 of the settlement was guaranteed irrespective of how long Chad lived. The settlement also covered Chad's medical expenses for a period in excess of fourteen years.

II. PETITIONERS' SEVENTH AMENDMENT CLAIMS ARE WITHOUT MERIT SINCE THERE EXISTS NO SIGNIFICANT FEDERAL QUESTION, GRANTING OF SUMMARY JUDGMENT DOES NOT VIOLATE THE DUE PROCESS CLAUSE, THERE IS NOTHING TO DEMONSTRATE THAT THE UTAH SUPREME COURT EVEN APPLIED THE "FAIR MINDED JURY" TEST PETITIONER COMPLAINS OF, AND AT ANY RATE THE UTAH COURTS' GRANTING OF SUMMARY JUDGMENT WAS PROPER IN THIS CASE.

A. The Matters at Issue Do Not Involve Significant Questions of Federal Law and the Granting of Summary Judgment in This Case Did Not Violate Either the Due Process Clause or the Seventh Amendment.

Rule 10 of the Supreme Court Rules states in part: "a petition for a Writ of Certiorari will be granted only when there are special and important reasons therefor." The issues in this case do not constitute or involve a conflict between United States courts of appeals, a conflict between state and federal courts concerning a federal question, a conflict among state courts of last resort, or a question of federal law not already firmly established. *See* Sup. Ct. R. 10.1(a)-(c).

As with Petitioners' due process claims, the matters at issue in this case are whether the settlement of a possible medical malpractice claim involving a minor was proper; whether the probate court appropriately approved the settlement; whether a Release of All Claims signed by Petitioners was obtained by fraud or whether it was valid and binding; whether the Petitioners were represented by legal counsel; and whether a factual or legal basis existed for a legal malpractice claim.

The probate court, after due consideration, including questioning the Petitioners in open court, approved the Settlement Agreement at the request of Petitioners. Sub-

sequently, Petitioners filed a lawsuit attempting to invalidate the Settlement Agreement with IHC and claiming legal malpractice against IHC's attorney. The Petitioners' claims and allegations were appropriately reviewed by the trial court in connection with Motions for Summary Judgment filed by all Respondents. Memoranda were submitted and oral argument took place. Subsequently, the trial court, pursuant to Rule 56 of the Utah Rules of Civil Procedure, granted summary judgment to all Respondents, and held that no factual or legal basis existed to support the Petitioners' claims, that no material facts were in dispute, and that all Respondents were entitled to judgment as a matter of law.

The Petitioners appealed to the Utah Supreme Court. The matter was extensively briefed and oral argument was held. After due consideration and deliberation, the Utah Supreme Court affirmed in all respects the granting of summary judgment in favor of all Respondents by the trial court. Subsequently, the Petitioners filed a Petition for Rehearing before the Utah Supreme Court. Briefs were filed, the Petitioners' claims were again duly considered and reviewed by the Utah Supreme Court, and the Petition for Rehearing was denied.

With respect to Petitioners' seventh amendment claim, Petitioners' due process rights were fully and adequately protected. The relevant issues have been heard before a probate judge, a trial judge, and twice before the Utah Supreme Court. The Petitioners claim that the trial court and the Utah Supreme Court "discounted plaintiffs' facts" is incorrect. The trial court and the Utah Supreme Court may have discounted Petitioners' *allegations* and *claims* because they were unsupported and contradicted by the uncontroverted or overwhelming facts that showed Petitioners' claims to be false, untenable or immaterial under Utah law.

The issue of granting summary judgment pursuant to Rule 56 of the Utah Rules of Civil Procedure (virtually identical to Rule 56 of the Federal Rules of Civil Procedure) is not a matter constituting a significant question of federal law. No significant conflict exists among the state and federal jurisdictions in connection with the granting of summary judgment. This Court has long recognized that summary judgment is proper where no material facts are in dispute. *Fidelity and Deposit Company v. United States of America to the Use of Lewis E. Smoot*, 187 U.S. 315 (1902). This Court continues to approve of the summary judgment procedure in its more recent decisions. In *Celotex Corporation vs. Catrett*, 477 U.S. 316 (1986), this Court stated:

> The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut but rather as an integral part of the Federal Rules as a whole which are designed "to secure the just, speedy and inexpensive determination of every action".

Id. at 329, 106 Sup. Ct. at 2555.

It is further well established in law, and undisputed among the various jurisdictions, that the summary judgment procedure does not constitute a violation of a party's seventh amendment right to a jury trial. In *King vs. United Benefit Fire Insurance Company*, 377 F.2d 728, 731 (10th Cir.), *cert. denied*, 389 U.S. 857, 88 S.Ct. 99 (1967), the court stated in relevant part that "[i]t is firmly established that the granting of a motion for summary judgment or directed verdict in an appropriate case does not infringe upon the right to trial by jury . . . ." [7]

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[7] *See also Gregg v. U.S. Industries, Inc.*, 715 F.2d 1522, 1530 (11th Cir. 1983), *cert. denied*, 466 U.S. 960, 104 S.Ct. 2173 (1984) (no

Petitioners cite no authority for the proposition that the appropriate granting of summary judgment, as took place in the matters at issue herein, constitutes a violation of constitutional rights.

The Petitioners' due process and seventh amendment rights received meticulous and careful protection by the probate judge approving the Settlement Agreement at the request of Petitioners, by the trial judge ruling on the motions for summary judgment and twice by the Utah Supreme Court in connection with the Petitioners' appeal and request for rehearing. Pursuant to Supreme Court Rule 10, there is no reason, factually, legally, or conceptually that would suggest that this issue should be further reviewed by this Court.

B. It Is Not Apparent That the Utah Supreme Court Even Applied the "Fair Minded Jury" Test Complained of by Petitioners.

Petitioners complain that the "fair minded jury" test deprived them of their right to a jury trial. There is nothing in the Utah opinion that indicates that the Utah Supreme Court utilized that test. Indeed, the opinion does not once refer to that test. Questions posed by the court to an attorney at oral argument are not compelling evidence of the legal test the court applied—especially since the court never once referred to that legal test in its opinion, but spcifically applied the time worn Utah rule that summary judgment is proper only when "no genuine issue of material fact exists . . . ." *See* Petitioners' Brief at A-15-16; 798 P.2d at 738.

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seventh amendment violation where summary judgment properly granted); *Page v. Work*, 290 F.2d 323, 334 (9th Cir.), *cert. denied*, 368 U.S. 875, 82 S.Ct. 121 (1961) (district court's determination that summary judgment was proper foreclosed plaintiff's ability to complain of the deprivation of a jury trial).

C. Even if the "Fair Minded Jury" Test Was Used, That Test, as Applied in This Case Did Not Violate Petitioners' Constitutional Rights.

Petitioners' fears regarding the Utah Supreme Court's alleged "weighing" of the evideince are without foundation. The court looked at all of the Petitioners' allegations, claims and facts that were allegedly in controversy. The court also examined the uncontroverted facts and concluded that no *genuine* issue of *material* fact existed with regard to the Atkinsons' allegations of fraud and negligent misrepresentation. Although the court specifically recognized that *some* factual disputes might still exist, the summary judgment must be affirmed because there was no *material* fact that was *genuinely* controverted. Petitioners' Brief at A-15-16; 798 P.2d at 738.

D. The Utah Supreme Court Properly Ruled That No Genuine Issues of Material Fact Existed and That Summary Judgment Was Proper.

Petitioners assert that the Respondents misrepresented Chad's true condition and that Mr. Morgan was acting as their attorney in representing them. The Utah courts properly found both of these claims meritless.

1. *There was no misrepresentation because the Atkinsons knew Chad suffered brain damage as a result of the incident in March of 1983 at Primary Children's Hospital.*

Petitioners' claim that the Respondents fraudulently misrepresented Chad's condition is without merit because the Atkinsons' knew Chad suffered brain damage as a result of the incident in March of 1983.

Petitioners allege that an error was committed by the Utah Supreme Court because a jury should have been allowed to decide whether the Atkinsons were fraudulently misled about the seriousness of Chad's condition. The Atkinsons claim these misrepresentations caused

them to unjustly settle their claim. However, the undisputed facts demonstrate that the Atkinsons knew their child had sustained brain damage. Contained in the Court Transcript of Hearing, July 22, 1983, are found the following questions to both Mr. and Mrs. Atkinson:

> THE COURT: Do you believe you have a claim against Intermountain Health Care?
> MRS. ATKINSON: Yes, I do.
> THE COURT: What's the nature of the child's injury?
> MRS. ATKINSON: Brain damage.
>
> * * * *
>
> THE COURT: Do you believe that you, on behalf of the child, have a claim against Intermountain Health Care?
> MR. ATKINSON: Yes, I do.

Transcript at pp. 2-4.

In addition to knowing that Chad suffered brain damage, the Atkinsons also knew that the injury could be permanent and severe. The contents of the release which the Atkinson's read, had explained to them, and signed, expressly state that "[t]he undersigneds hereby declare and represent that the injuries sustained by Chad Atkinson are or may be permanent and progressive and that recovery therefrom is uncertain and indefinite . . . ." Furthermore, at the settlement hearing, the court clarified and questioned the Atkinsons about the issue:

> THE COURT: Do you understand that by settling this case, and regardless of what later transpires, when you find out later that the child's injury is worse than you anticipated, and on the other hand even if it's better, that you will not ever be able to come back against Intermountain Health Care? Do you understand that?
> MR. ATKINSON: Yes, sir, I do.

Transcript at p. 2.

The Atkinson thoroughly understood that Chad was brain damaged and that later there might be more serious developments from the injury than those existing at the time of settlement. Where the facts are undisputed and a moving party is entitled to judgment as a matter of law, it is not necessary for such a case to be submitted to a jury. *See* Utah R. Civ. P. 56(c); *Geneva Pipe Co. v. S. & H Ins. Co.*, 714 P.2d 648, 649 (Utah 1986).

2. ***There exists no material fact that supports Petitioners' claim that Morgan was representing them.***

As with the alleged fraud, the Utah Supreme Court examined the legal malpractice claim in detail. Indeed, the Court examined all theories propounded by Petitioners, including: whether there existed an implied contract between Morgan and Petitioners, whether there existed a limited attorney-client relationship between Petitioners and Morgan, whether Morgan owed a duty to Petitioners based on a theory of third-party liability, and whether Morgan undertook a duty to act by offering Petitioners volunteered legal advice. Petitioners' Brief at A-5; 798 P.2d at 735.

Either uncontroverted or overwhelming evidence established the following: At no time did the Atkinsons consider Morgan to be their attorney, and Morgan at no time agreed to be their attorney; there was no contract of employment, express or implied, or retainer agreement between the Atkinsons and Morgan; the Atkinsons did not pay for any service performed by Morgan; Morgan was hired by IHC which paid for all of his services; all of the pleadings and documents that were prepared and filed by Morgan clearly indicated that Morgan was representing IHC and not the Atkinsons; the Atkinsons had an opportunity to review all relevant documents in connection with the approval of the settlement and did so prior to the hearing before the probate judge; at the

hearing, the probate judge was aware that Morgan represented IHC and not the Atkinsons; at the probate hearing, Mrs. Atkinson stated in open court that although the Atkinsons had talked to an attorney (not Morgan) concerning the claim, that they were not going to hire an attorney because settlement had been reached; the Atkinsons were adults at the time of the signing of the agreement and at the probate hearing; the Atkinsons relied on the assistance of George Atkinson, a union negotiator, and not on Morgan in connection with any aspect of the Settlement Agreement; and the Atkinsons agreed to the terms and conditions of the Settlement Agreement with IHC prior to the time that Morgan was retained by IHC to prepare the relevant settlement documents.

The Utah Supreme Court properly concluded that there was no genuine issue of material fact in dispute with regard to the legal malpractice claims and that summary judgment was proper as a matter of law.

CONCLUSION

Petitioners' due process claim was not raised in the Utah courts, there is no federal question here that conflicts with any state, appellate or Supreme Court decision, and Petitioners' due process rights were not violated by the settlement procedure.

Similarly, Petitioners' seventh amendment claims are without merit since there exists no significant federal question, granting of summary judgment does not violate the due process clause, there is nothing to demonstrate that the Utah Supreme Court even applied the "fair minded jury" test of which Petitioners complain, and at any rate the Utah courts' granting of summary judgment was proper in this case. Thus, the Petition for Certiorari should be denied.

Respectfully submitted,

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